153

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No. 09-770

In The
Supreme Court of the United States

THE BOSTON TEACHERS UNION, LOCAL 66, AFT, MFT, AFL-CIO, ET AL.,
Petitioners,

v.

COMMONWEALTH EMPLOYMENT RELATIONS BOARD AND BOSTON SCHOOL COMMITTEE,
Respondents.

On Petition for Writ of Certiorari to the Massachusetts Appeals Court

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether an injunction issued under a Massachusetts statute infringed the First Amendment rights of a public employee union where (1) the injunction merely required it to disavow conduct orchestrating a vote by its membership to call a strike which is validly prohibited by state law and (2) the injunction did not constrain the union in any way from advocating the abstract proposition of a right to strike or from communicating its views about collective bargaining negotiations.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

STATEMENT OF THE CASE 1

1. Massachusetts Statutory Scheme 2

2. Facts 4

3. Commission Decisions 6

4. Superior Court and Appeals Court Decisions 7

REASONS WHY THE PETITION SHOULD BE DENIED 8

I. THE INJUNCTION MERELY REQUIRED THE UNION TO DISAVOW THE MOTION WHICH UNDER ITS BYLAWS WAS THE NECESSARY STEP FOR CALLING AN ILLEGAL STRIKE. THE CONDUCT ENJOINED THEREFORE IS NARROWER THAN THAT WHICH THE UNION CONCEDES IS PROPERLY REGULATED BY THE STATUTE AND THE APPEALS COURT'S DECISION RAISES NO ISSUE FOR THIS COURT'S RESOLUTION. 8

II. EVEN IF THE ACTION WHICH THE INJUNCTION REQUIRED THE UNION TO DISAVOW COULD BE CONSIDERED "ADVOCACY", IT WAS ADVOCACY DIRECTED AT PROMOTING AN ILLEGAL STRIKE. THE INJUNCTION THEREFORE IS CONSISTENT WITH THIS COURT'S LONG-STANDING PRECEDENT. 11

III. THE PETITION CHALLENGES A STATE COURT DECISION THAT AN ADMINISTRATIVE AGENCY'S PRIOR CONSTRUCTION OF A STATE STATUTE WAS WRONG AND WAS CORRECTLY ABANDONED IN THIS CASE. IT THEREFORE RAISES NO QUESTION WHICH IS APPROPRIATE FOR RESOLUTION BY THIS COURT. 14

CONCLUSION 17

TABLE OF AUTHORITIES

Cases

Att'y General v. Comm'r of Insurance,
442 Mass. 793 (2004) 16

Aurora Ed. Ass'n East v. Board of Ed. of Aurora Public Sch. Dist.,
490 F.2d 431 (CA7 1973), *cert. denied* 416 U.S. 985 (1974) 13

Boston Sch. Committee,
10 MLC 1289 (1983) 6, 14

Boston Teachers Union, Local 66,
27 MLC 32 (2000) 14, 15

Brandenburg v. State of Ohio,
395 U.S. 444 (1969) 12, 13

City of Worcester,
13 MLC 1627 (1987) 14

Dir. of Div. of Employee Relations v. Labor Relations Comm'n,
370 Mass. 162, 346 N.E.2d 852 (1976) 2, 4

Gitlow v. People,
268 U.S. 652 (1925) 12

Mass. Comm. Coll. Council MTA/NEA v. Labor Relations Comm'n,
402 Mass. 352, 522 N.E.2d 416 (1988) 16

MCI Worldcom Comm'ns, Inc. v. Dep't of Telecomm. & Energy,
442 Mass. 103, 810 N.E. 2d 802 (2004) 16

Noto v. United States,
367 U.S. 290 (1961) 12

United States v. O'Brien,
391 U.S. 367 (1968) 11, 15

United States v. Taylor,
693 F.2d 919 (CA9 1982) 12, 13

United States v. Williams,
553 U.S. 285, 128 S.Ct. 1830 (2008) 12, 13

United Steel Workers of America, AFL-CIO v. University of Alabama in Birmingham,
430 F. Supp. 996 (N.D. Ala. 1977) 11

Utility Workers of America, Local 466 v. Labor Relation Comm'n,
389 Mass. 500, 451 N.E.2d 124 (1983) 4

Yates v. United States,
354 U.S. 298 (1957) 12

Constitutional Provisions and Statutes

U.S. Const. amend. I ..... *passim*
G.L. c. 23, § 90 3
G.L. c. 149, §§ 178G-N 3
G.L. c. 150E, § 9A ..... *passim*
St. 1965, c. 763, § 2 3
St. 1973, c. 1078, § 2 3
St. 2007, c. 145, § 5 3

Respondent Boston School Committee ("the School Committee") respectfully opposes the petition of Boston Teachers Union, Local 66 and its officials ("petitioner") for a writ of certiorari to review the decision of the Massachusetts Appeals Court dated June 25, 2009.

OPINIONS BELOW

The Appeals Court's decision is reported at *Commonwealth Employment Relations Board v. Boston Teachers Union, Local 66*, 74 Mass.App.Ct. 500, 908 N.E. 2d 772 (2009). The decision of the Supreme Judicial Court which denied petitioner's application for further appellate review is not reported but is referred to in a table at 455 Mass. 1102 , 914 N.E.2d 330 (2009).

STATEMENT OF THE CASE

Petitioner is a union which represents school teachers employed by the Boston public schools. Conceding that it is lawfully barred under a Massachusetts statute from ""induc[ing], encourag[ing], or condon[ing]" a strike by its members, petitioner nevertheless asserts that a judicial injunction which carefully tracked the statute violated its First Amendment speech rights. The injunction did nothing more than enforce the statute's plain (and unchallenged) terms and ordered that petitioner disavow the procedure which it had set in process for orchestrating an illegal strike.

Petitioner's theory is that a statute which properly authorizes a procedure to prevent strikes can nonetheless be circumvented by a union's

manipulation of dates so that the statutory procedure cannot be completed before the unlawful work stoppage takes place. The petition is grounded in two fictions. First, it assumes wrongly that this lawsuit is about exercising the right to "debate" the question of strikes by public employees. The reality is that the case concerns plainly illegal acts and has no bearing on whether petitioner or its members may discuss or debate that issue or any other. The petition also assumes, incorrectly, that the state courts enjoined "debate" and caused petitioner grave doubt regarding what it may communicate to its members during collective bargaining. The reality is that no reading of the injunction could possibly cause any uncertainty that petitioner is free to vigorously criticize the School Committee's negotiating stance and to advocate rejection of the School Committee's proposals.

The Massachusetts Appeals Court decision which affirmed the injunction and which is the subject of this petition raises no important question of federal law that requires settlement by this Court. Moreover, to the extent that First Amendment speech interests are even implicated the court's decision is in no respect inconsistent with this Court's relevant precedent. There are, accordingly, no grounds which render this Court's exercise of its certiorari jurisdiction appropriate and the petition should be denied.

1. Massachusetts Statutory Scheme

For decades Massachusetts has recognized a "traditional absolute prohibition of strikes by public employees ...". *Dir. of Div. of Employee Relations v. Labor Relations Comm'n,* 370 Mass. 162, 167-68, 346 N.E.2d 852, 856 (1976) [citation omitted]. Public

employees were first given the right to collectively bargain the terms and conditions of their employment in 1965 with the enactment of G.L. c. 149, §§ 178G-N. As part of this legislative scheme, § 178M codified the longstanding policy against strikes in the public service and prohibited public employees from "engag[ing] in, induc[ing], or encourag[ing]" any strike or work stoppage.[1] The current statute, G.L. c. 150E, § 9A, was enacted in 1973.[2] Section 9A(a) expressly bars public employees *and* their unions from "engag[ing] in", and from "induc[ing], encourag[ing], or condon[ing]", any strike or work stoppage. This prohibition is not self-enforcing, however. Section 9A(b) specifies a two-step procedure in which the employer must first petition the respondent Commonwealth Employment Relations Board ("the Commission") for a determination that a provision of § 9A(a) "has been or is about to be violated".[3] If the Commission makes such a determination and "sets requirements", it may then "institut[e] appropriate proceedings in" the Superior Court to enforce its ruling.[4]

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[1] *See* St. 1965, c. 763, § 2.

[2] *See* St. 1973, c. 1078, § 2.

[3] At the time of the underlying events the state agency was called the "Labor Relations Commission". Subsequent to issuance of the injunction in this case the Commission's name was changed by St. 2007, c. 145, § 5, which amended G.L. c. 23, § 90, and the respondent was substituted as a party. The agency's name at the time of the injunction was sought and obtained is used herein.

[4] That is what happened here, resulting in the injunction which lies at the heart of this petition. The School Committee, which is charged with operation of the Boston public schools and which

There is no doubt that § 9A(b), which authorizes relief where a violation is "about to occur", is directed at preventing unlawful conduct before it takes place. *Dir. of Div. of Employee Relations v. Labor Relations Comm'n, supra* at 166; 856. Because, however, Massachusetts requires an initial administrative proceeding *prior* to seeking and obtaining an injunction, the Supreme Judicial Court has observed that the § 9A(b) procedure "necessarily involve[s] some delay ... [which] is ... inevitable under the petition procedure" even though "[s]trikes by public employees, ... may create exigent and unpredictable situations which require an immediate response". *Utility Workers of America, Local 466 v. Labor Relation Comm'n,* 389 Mass. 500, 504, 451 N.E.2d 124, 127 (1983). It is in this context that the challenged decision must be evaluated.

2. Facts

Petitioner sketches a skeletal and misleading picture of what took place. It points only to its motion to put before its members on February 14, 2007 "for discussion, consideration and debate" "the question whether there should be a one-day strike" the next morning [Pet. 3-4; Pet. App. 9a]. Petitioner mentions only a small sample of the evidence cited by the Commission in support of its conclusion, culling out that involving petitioner's criticism on its website of the School Committee's negotiating stance [Pet. 24; Pet. App. 10a-11a]. The Commission, however, found

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would have been directly harmed by an illegal strike, moved to intervene as a plaintiff in the Superior Court and its motion was allowed.

facts well beyond those selectively referenced in the petition. The Commission focused on petitioner's extensive facilitation of a strike and this undisputed evidence furnished ample support for its, and then the Superior Court's, conclusion that a clear violation of the statute was afoot.

First, petitioner's January 6, 2007 announcement on its website specified that the motion was "in accordance with the bylaws" [Pet. App. 9a]. Art. X, sec. 1(b) of petitioner's bylaws states "[a] general membership meeting is the only body which may accept or reject contracts or call a work stoppage." [Pet. App. 6a]. Moreover, petitioner's announcement informed its members that petitioner was "preparing for all exigencies"; scheduled "an emergency Area Captains meeting"; and scheduled "an emergency, sign-in Building Representatives meeting" [Pet. App. 11a-12a]. On the same date, petitioner's president notified the superintendent of schools that its executive board "had voted to take a motion to the membership to take a strike vote on February 14, 2007, with a strike date of February 15, 2007, if the motion passed" [Pet. App. 12a-13a]. Finally, on January 11, 2007 petitioner posted another announcement on its website. This announcement stated that during a meeting the day before which was attended by more than 650 members, the motion to put the issue of a strike before the membership on February 14 (which petitioner characterized as "self-

explanatory") had passed by "unanimous" vote [Pet. App. 13a].[5]

3. Commission Decisions

Petitioner's account of the rulings by the Commission is similarly and deceptively truncated. Based on the foregoing evidence the Commission decided on January 18, 2007 that an illegal strike was "about to occur" and that petitioner was "inducing, encouraging, and condoning such action" in violation of the statute [Pet. App. 19a-20a]. The Commission found that petitioner's "manipulation" of the dates for the vote and the strike would "preclude timely and effective enforcement to prevent, and not merely interrupt, actions that the Law prohibits" [Pet. App. 20a]. The Commission therefore abandoned its prior, agency-developed interpretation of the statute which had required "an actual strike vote as a predicate" to preventive action [Pet. App. 20a].[6] It ruled that petitioner had "started in motion the approval and authorization by a vote of the general membership to engage in a one-day strike as early as February 15, 2007" [Pet. App. 21a].

Cataloguing the financial harm which would affect the city and its schools, the "non-economic, incalculable harm and chaos" which would ensue, the resulting deprivation of 58,000 students' right to an education, and the extensive, detrimental impacts on

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[5] Subsequently, petitioner's official newspaper stated that its members left this meeting "with a 'steely willingness to strike if the School Committee forces [their] hand'" [Pet. App. 36a].

[6] *See, e.g., Boston Sch. Committee,* 10 MLC 1289, 1290 (1983).

their families and on law enforcement, the Commission imposed several requirements, including petitioner's rescission and disavowal of its motion [Pet. App. 21a-23a, 25a-26a]. After petitioner failed to comply, the Commission issued a determination of non-compliance on February 6, 2007 and then filed a lawsuit seeking injunctive relief in Superior Court [Pet. App. 28a-41a].

4. Superior Court and Appeals Court Decisions

Following a hearing the Superior Court issued a temporary restraining order and preliminary injunction on February 13, 2007. The court found that the Commission had met its burden of proof under § 9A and ordered six injunction provisions. Pertinent to the petition are paragraphs 3 and 4 which required petitioner, its officers, and its executive board to "publicly disavow" the decision to place before the membership on February 14 the motion regarding a strike vote [Pet. App. 45a-47a].

The Appeals Court affirmed, holding that the Commission's altered interpretation of § 9A is the correct construction [Pet. App. 79a-80a]. That court "reject[ed]" petitioner's insistence on the "actual vote" rule "because it would make the statute ineffective" [Pet. App. 80a]. It is the "disavowal" provision in the injunction order which is the subject of the Appeals Court's decision and of the petition at bar.[7]

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[7] The remaining provisions were simply couched in terms of the statute's language [Pet. App. 45a-47a]. Neither the Commission nor the Superior Court ever entered any order which barred

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE INJUNCTION MERELY REQUIRED THE UNION TO DISAVOW THE MOTION WHICH UNDER ITS BYLAWS WAS THE NECESSARY STEP FOR CALLING AN ILLEGAL STRIKE. THE CONDUCT ENJOINED THEREFORE IS NARROWER THAN THAT WHICH THE UNION CONCEDES IS PROPERLY REGULATED BY THE STATUTE AND THE APPEALS COURT'S DECISION RAISES NO ISSUE FOR THIS COURT'S RESOLUTION.

Throughout these proceedings petitioner has never attacked the statute as facially unconstitutional or overbroad. Petitioner therefore admits that Massachusetts lawfully may prohibit it from exercising the activities which are specifically proscribed by § 9A. Instead, its theory has always been that something about the Commission's and the Superior Court's application of the statute contravenes the First Amendment. The argument makes no sense in light of the record.

As noted, § 9A(a) makes it unlawful for petitioner to "induce, encourage, or condone" a strike. The injunction entered by the Superior Court is, if anything, narrower than the authority conferred by

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petitioner or its members from debating whether public employees should have the right to strike [Pet. App. 24a-27a; 45a-47a]. Likewise, neither tribunal ever entered any order which enjoined petitioner from using its website to criticize, vehemently, forcefully, or in any other manner, the School Committee's bargaining position [Pet. App. 24a-27a; 45a-47a].

the statute. It regulates activities which are well within the categories set forth in § 9A and which fall far short of touching their outer limits. Paragraph 3 of the court's injunction provisions is at the center of this dispute. That provision, however, merely ordered petitioner to "publicly disavow" the December, 2006 vote of its executive board to schedule a meeting at which a vote would be taken on whether to call an illegal strike the next morning [Pet. App. 46a]. Petitioner's motion was the *sine qua non*, and last required step, under its bylaws for "call[ing]" an illegal "work stoppage" [Pet. App. 6a]. The court therefore only required petitioner to repudiate an act which set in motion the process of violating the statutory ban on strikes.

The remaining paragraphs were even more narrowly tailored to fall within the scope of § 9A(a). Paragraph 4 did nothing beyond specifying the method for accomplishing effective notification of the disavowal to petitioner's membership [Pet. App. 46a]. Paragraphs 1 and 2 incorporated the language of the statute and enjoined violation of those terms [Pet. App. 45a-46a]. Paragraph 5 ordered petitioner to notify its members of their obligation "not to participate in any form of strike or work stoppage" [Pet. App. 47a]. Finally, paragraph 6 required petitioner to inform its members of the "provisions of G.L. c. 150E, §§ 9A(a) and (b) and of the contents of the [Commission's] Order" [Pet. App. 47a]. Nothing in the Superior Court's injunction purported to cabin "debate" or to restrain petitioner's communications to its members about the parties' negotiations [Pet. App. 45a-47a]. The Appeals Court decided the question correctly and succinctly. It held that "[t]he injunction placed no prior restraint upon the union to engage in public speech or debate,

but rather prohibited it from engaging in actions that properly were prohibited under § 9A." [Pet. App. 81a].

Petitioner's argument that the injunction "[r]estrain[ed] a union's leadership from expressing frustration with the progress of contract negotiations to its own members" is unvarnished hyperbole which clashes with the plain English of the order [Pet. 24; Pet. App. 45a-47a]. Petitioner could have scheduled and staged a "debate" about whether public employees should be able to walk off their jobs. It could have posted daily bulletins on its website criticizing the School Committee's proposals as unfair or unreasonable. Nothing would have happened had it done those things. Instead petitioner went about the business of directly fomenting that which it acknowledges Massachusetts validly forbids. The administrative and judicial responses were carefully targeted to meet the law's proscription.

Had petitioner chosen to attack the terms of the statute its case would still be wanting [*infra* pp. 11-13]. It opted not to do so, however. Given petitioner's concession that § 9A(a) can constitutionally regulate the activities specified in the statute, petitioner has no hope of showing that the Superior Court's narrower enforcement of § 9A raises any federal concerns.

II. EVEN IF THE ACTION WHICH THE INJUNCTION REQUIRED THE UNION TO DISAVOW COULD BE CONSIDERED "ADVOCACY", IT WAS ADVOCACY DIRECTED AT PROMOTING AN ILLEGAL STRIKE. THE INJUNCTION THEREFORE IS CONSISTENT WITH THIS COURT'S LONG-STANDING PRECEDENT.

This case involves governmental regulation which has, at most, only an incidental effect on protected speech and is directed at noncommunicative conduct. The Appeals Court's decision therefore easily survives the test required by *United States v. O'Brien,* 391 U.S. 367, 381-82 (1968). Even if what was enjoined here can be viewed as speech rather than as illegal action, however, petitioner's constitutional argument is barren.

Petitioner, of course, has never argued that public employees have a First Amendment right to strike or to take steps which will launch a strike. This is for good reason because the absence of any such right is well established. *See, e.g., United Steel Workers of America, AFL-CIO v. University of Alabama in Birmingham,* 430 F. Supp. 996, 1001-02 (N.D. Ala. 1977) and cases cited. By ordering petitioner to disavow the process it had commenced, the Superior Court did no more than bar an illegal act without any constitutional implications. Assuming solely *arguendo,* however, that petitioner's orchestration of an illegal strike through the artifice of labeling its motion as one for "debate, discussion, and consideration" satisfies the test for speech, petitioner's case fails. The injunction lies well within the permissible area of

regulation which has always found favor in this Court's decisions.

This Court has long recognized a sharp "distinction between advocacy of abstract doctrine and advocacy directed at promoting unlawful activity ... in [its] opinions ... ." *Yates v. United States,* 354 U.S. 298, 318 (1957). Under this demarcation, statutes which tolerate the former but proscribe the latter will survive constitutional challenge. *Id. See, e.g., Noto v. United States,* 367 U.S. 290, 297-98 (1961), comparing "the mere abstract teaching of theory" with "preparing a group for violent action and steeling it to such action"; *Brandenburg v. State of Ohio,* 395 U.S. 444, 447-48 (1969) (per curiam), stating that "[a] statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments". The principle may well be venerable. *See Gitlow v. People,* 268 U.S. 652, 665 (1925), differentiating "philosophical abstraction" from "language of direct incitement". It also remains vibrant, however. *See United States v. Williams,* 553 U.S. 285, , 128 S.Ct. 1830, 1842 (2008), referring to the "important distinction between a proposal to engage in illegal activity and the abstract advocacy of illegality."

In the arena of public sector labor relations the lower courts have followed this Court's doctrine faithfully. *United States v. Taylor,* 693 F.2d 919 (CA9 1982), involved a statutory scheme under which (1) a person was barred from employment by the federal government if he "participates in a strike, or *asserts the right to strike*" and (2) a violation was made criminal. *Id.* at 921 [emphasis added]. The court severed these provisions, sustaining those which were

premised on participation in a strike but invalidating those which penalized mere "assertion of the right to strike" because the latter activity "is protected by the First Amendment." *Id.* at 921-22. In *Aurora Ed. Ass'n East v. Board of Ed. of Aurora Public Sch. Dist.*, 490 F.2d 431 (CA7 1973), *cert. denied* 416 U.S. 985 (1974), the court invalidated a school board policy which precluded a teacher from receiving a full salary if he held a belief that teachers should have the right to strike. The court ruled that "the mere philosophical or political assertion of the declarant's belief that he has a right to strike" as a "purely theoretical position" is protected by the First Amendment. *Id.* at 434 and cases cited.

So measured, the Superior Court's injunction order clearly comported with this Court's interpretation of the First Amendment. Petitioner was not engaged in the "abstract advocacy" of a public employee's right to strike. *United States v. Williams, supra* at 1842. Instead, if petitioner's conduct launching the procedure for an unlawful strike can even be characterized as "advocacy", it was advocacy "propos[ing] to engage in illegal activity." *Id.* Indeed, the Superior Court's order would survive a more rigid view of First Amendment constraints on governmental regulation than that which this Court has adopted. Petitioner presents "a classic case where speech is brigaded with action" and the injunction would raise no First Amendment problem even under this more stringent test. *Brandenburg v. State of Ohio, supra,* at 456 (Douglas, J., concurring).

III. THE PETITION CHALLENGES A STATE COURT DECISION THAT AN ADMINISTRATIVE AGENCY'S PRIOR CONSTRUCTION OF A STATE STATUTE WAS WRONG AND WAS CORRECTLY ABANDONED IN THIS CASE. IT THEREFORE RAISES NO QUESTION WHICH IS APPROPRIATE FOR RESOLUTION BY THIS COURT.

Petitioner's argument that the Commission was obliged to follow its own "actual vote" rule of interpretation as the "least restrictive" application of the Massachusetts statute obviously suffers from the mortal flaw that there is no colorable First Amendment violation [Pet. 10, 11, 20-21]. There are additional, fundamental defects in its theory as a basis for this Court's exercise of certiorari jurisdiction, however.

The administrative rule cited by petitioner is just that – an interpretation of the Massachusetts statute's controlling language by the state agency charged with its initial enforcement. The rule was established by the Commission in order to "effectuate the policies of G.L. c. 150E". *Boston Sch. Committee,* 10 MLC 1289, 1290 (1983). It was premised on the Commission's conclusion at the time that where a strike vote has not yet been taken it would be "inappropriate" and "speculati[ve]" to conclude that a violation was about to occur. *Id.* & n.3. *See also City of Worcester,* 13 MLC 1627, 1629 (1987), stating that absent an actual vote to strike it would be improper to decide that "a threatened strike is ... imminent"; *Boston Teachers Union, Local 66,* 27 MLC 32, 34 (2000). This rule derived solely from the Commission's

construction of the language used in § 9A and to no extent from First Amendment concerns, which therefore went unmentioned. *Id.*

The ruling which petitioner now attacks represents nothing more than judicial adoption of the agency's prudent refusal to blindly apply its rule where to do so would emasculate the statute. As noted, the Commission overruled its previous interpretation because it recognized that petitioner's manipulation of the dates for the vote and for the strike would make it impossible to effectuate § 9A's central purpose of preventing the widespread harm caused by an illegal strike [Pet. App. 20a]. Petitioner's concrete steps to mobilize for the strike amounted to a concession that the February 14 vote was a mere formality [Pet. App. 11a-12a]. The Appeals Court rightly confirmed the Commission's abandonment of the ill-advised "actual vote" requirement. The court observed that "[t]he longstanding 'actual vote' rule assumes that a public employer will have sufficient time to engage the process set forth in the Act once a strike vote has been held." [Pet. App. 79a]. Continuing, the court held "[t]hat assumption is invalid in the particular circumstances of this case, and we therefore reject the interpretation of the statute suggested by the union because it would make the statute ineffective." [Pet. App. 80a].

There is nothing controversial or remotely touching on constitutional significance in this decision. The "least restrictive" application of the statute for which petitioner argues is, in reality, no application [Pet. 10, 11, 20-21]. *Cf. United States v. O'Brien, supra* at 381. An administrative agency is free (and in an instance such as this is *obligated*) to conclude that its prior

construction of the governing statute is outdated and that mindless adherence to a rule which undermines that statute should be abandoned. *Cf. MCI Worldcom Comm'ns, Inc. v. Dep't of Telecomm. & Energy,* 442 Mass. 103, 115-16, 810 N.E.2d 802, 812 (2004) [citations omitted]; *Att'y General v. Comm'r of Insurance,* 442 Mass. 793, 800, 817 N.E.2d 742, 748 (2004). The Commission more than adequately explained its overruling of the earlier precedent. It explicitly pointed out that in light of the undisputed facts an inflexible prerequisite of an actual vote "allows for the kinds of strike threats, disruptions, and manipulation of strike votes and strike dates that preclude timely and effective enforcement to prevent, and not merely interrupt, actions that the Law prohibits" [Pet. App. 20a].

More important, the Massachusetts courts, and not the Commission, are charged with the ultimate responsibility for ascertaining the proper construction of this statute's terms. *Mass. Comm. Coll. Council MTA / NEA v. Labor Relations Comm'n,* 402 Mass. 352, 353, 522 N.E.2d 416, 417 (1988). The Appeals Court "reject[ed]" the "actual vote" rule because its application would have completely undermined § 9A [Pet. App. 80a]. In fact, had the Commission clung unblinkingly to that interpretation the court would have been obligated to reverse. *Id.*

In effect, petitioner invites this Court to intervene because a state court has construed a state law in the only manner which could block petitioner's frustration of the statute's lawful, salutary purpose by the contrivance of manipulating dates. The decision of the Appeals Court to adopt the agency's reasoning for its own interpretation of § 9A as a matter of

Massachusetts law affords no occasion for granting the petition, either on the merits or for the purpose of vacating and remanding for reconsideration. This is so regardless of whether the Commission takes no stance on the petition or, instead, indicates that it has now altered its position on the Appeals Court's rejection of the "actual vote" rule.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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